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**REMARKS**

Independent claim 1 has been further amended to more clearly recite the structure and function of the inventive beverage packaging unit.

Briefly, the present invention relates to an improved beverage packaging unit that is directed to providing a container that results in improved efficiency when transporting a plurality of such containers, and to a container having improved hygiene when drinking from such containers. The transportation efficiency is achieved by making the several walls of the container in parallelepipedal form, rather than in the more conventional cylindrical form, which serves to decrease transportation volume by permitting tighter packing of the containers relative to each other, thereby eliminating the void spaces between adjacent cylindrical containers when they are placed in shipping cartons. The hygiene improvement is achieved by enabling drinking of beverages from the container without direct contact by the drinker's lips with container surfaces that have been exposed to the surroundings after filling of the container and application of a closure element.

As amended, claim 1 more clearly recites the form of the container as a box-like body having opposed side and opposed top and bottom walls that are parallel, thereby providing the parallelepipedal form defined by respective rectangular outer walls. The description in the specification, the illustrations in the drawings, and the ordinary dictionary definition of parallelepiped support the amendments in claim 1 that further define the container shape. In addition to the container shape clarification, amended claim 1 also more specifically recites

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the shape of the closure element, which completes the parallelepipedal form of the packaging unit when the closure element is applied to a tubular part that extends from a bevelled corner of the packaging unit and that includes a dispensing opening.

All 10 claims were rejected as obvious over the combination of the Cornell et al. '278 reference and the opinion of the court in the case of *In re Dailey*. However, instead of a parallelepipedal packaging unit, the primary Cornell et al. reference discloses a container having a body with a rectangular cross section and on which is provided a gable top (see Cornell et al., col. 3, lines 44-45), which is clearly structurally different from the claimed invention. In that regard, the following recitations in amended claim 1 are neither shown in nor suggested by the Cornell et al. reference:

1. opposed, planar and parallel top and bottom walls;
2. front and rear walls and sidewalls that each extend between and are perpendicular the top and bottom walls;
3. one upper corner of the hollow box-like body is bevelled to form a planar triangular surface at the one upper corner of the box-like body;
4. a closure element including a generally pyramidal body having a triangular base with three edges and having triangular sides that extend from respective ones of the edges of the triangular base to form the pyramidal body;
5. a closure element that is configured so that respective ones of the triangular sides of the closure element are coplanar with respective adjacent

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sidewalls and the top wall of the packaging unit when the closure element overlies the tubular part and overlies the dispensing opening and when the triangular base of the closure element is in surface-to-surface abutment with the bevelled corner of the box-like body;

6. a stackable parallelepipedal packaging unit that when stacked vertically one packaging unit upon another packaging unit the bottom wall of an upper packaging unit rests stably on and is in surface-to-surface contact with the top wall of a lower packaging unit; and

7. when the closure element is connected the packaging unit is defined by respective rectangular outer walls.

The cited case of *In re Dailey et al.* relates to a decision in an appeal directed to claims for a nursing container. The structure of the nursing container that was the subject of that case is shown in U.S. Patent No. 3,289,874. That container is even further afield from the claimed invention than is the container disclosed in the Cornell et al. reference. Indeed, The Dailey et al. patent discloses a saucer-shaped or top-shaped container composed of cup-shaped upper and lower parts that are joined about their peripheral edges to form what clearly is a non-parallelepipedal container. Additionally, by virtue of the provision on the bottom part 12 of a downwardly-extending pull tab 42, that container is not one that is stackable one above another.

Further in regard to *In re Dailey et al.*, the court decided that the four claims that were the subject of the appeal involved a container configuration that was not shown to be significant relative to the known prior art. The

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features of the invention as recited in amended claim 1 of the present application, and as listed above as distinctions over the Cornell et al. reference, are not present in the Dailey et al. container as it is disclosed in the Dailey et al. '874 patent. Those features are not minor or trivial changes because they result in a beverage container that is stackable, that can be shipped along with other such containers without void spaces between them, and that provides a hygienic container that one can safely drink from without exposing himself to debris or foreign matter to which outer surfaces of the container might have been exposed during manufacture, filling, and shipment.

Amended claim 1 also recites the functional limitation of stackability of the claimed container invention. Functional recitations in a claim must be disclosed in a reference in order for that reference be a proper basis upon which to ground a finding of obviousness. That functional limitations must be considered and cannot be ignored was set forth by the former Board of Patent Appeals as follows:

Although we have sustained several of the Examiner's rejections we here wish to specifically note that contrary to the Examiner's assertions, *functional language in the claims must be given full weight and may not be disregarded in evaluating the patentability of the subject matter defined employing such functional language*. However, the applicant must establish that what is taught by the reference does not inherently function in the same manner required by the claim; cf. *In re Hallman* decided by the CCPA July 16, 1981, 655 F.2d 212, 210 U.S.P.Q. 609. *Ex parte Bylund*, 217 U.S.P.Q. 492, 498 (Bd. App. 1981) (Emphasis added).

And the Federal Circuit has held to the same effect. *K2 Corp. v. Salomon S.A.*, 52 U.S.P.Q.2d 1001, 1004 (Fed. Cir. 1999) ("The functional language is, of course, an additional limitation in the claim."). Thus, the functional recitation contained in

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claim 1 must be given full effect, and when so considered it, together with the other, structural recitations in that claim, are together limitations that serve to clearly differentiate the claimed invention over the disclosures of each of the references that were relied upon.

One of only ordinary skill in the art having before him the references that were relied upon would not be led to the claimed invention. The differences between the claimed structure and function and the structures and functions disclosed in the references are not obvious differences. And there is no teaching in either of the references that would lead one of only ordinary skill in the art to the claimed structure, whether the references be considered individually or together.

Additionally, the obviousness conclusion was justified in the Action on the ground that only "a change of form or shape" is involved. But the cited prior art does not show or suggest the claimed form or shape, nor does it show or suggest its advantages. An obviousness rejection cannot be based upon an unsupported conclusion alone. It must be based upon factual evidence in the record, not on mere opinion. And in regard to an unsupported conclusion grounded on basic knowledge or common sense as a basis for an unpatentability conclusion the Federal Circuit has clearly stated

[T]he deficiencies of the cited references cannot be remedied by the Board's general conclusions about what is "basic knowledge" or "common sense" to one of ordinary skill in the art....We cannot accept these findings by the Board. This assessment of basic knowledge and common sense was *not based on any evidence in the record and, therefore lacks substantial evidence support*....With respect to core factual findings in a determination of patentability, however, the Board cannot simply reach conclusions based on its

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own understanding or experience – or on its assessment of what would be basic knowledge or common sense. Rather, *the Board must point to some concrete evidence in the record in support of these findings.*

*In re Zurko*, 59 U.S.P.Q.2d 1693, 1697 (Fed. Cir. 2001) (Emphasis added).

In the present instance there is no concrete evidence in the record that would support the obviousness conclusion, because that conclusion is purely a statement of opinion of what an ordinarily skilled person would do. The conclusion is without a factual, evidence-based foundation, and it therefore is without evidentiary support in the record. Accordingly, the obviousness conclusion stated in the Action is not warranted by the references that were relied upon as the basis for the rejection.

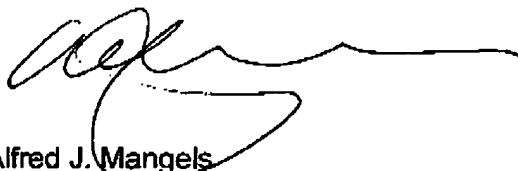
Claims 2-10 each depend from amended claim 1, either directly or indirectly, and therefore each of those claims is also not obvious from the combination of the Cornell et al. and *In re Dailey et al.* references, and for the same reasons as are given above relative to amended claim 1.

Based upon the foregoing amendments and remarks, the claims as they now stand in the application are believed clearly to be in allowable form in that they patentably distinguish over the references that were relied upon, whether those references be considered in the context of 35 USC 102 or of 35 USC 103. Consequently, this application is believed to be in condition for allowance, and therefore reconsideration and reexamination of the application is respectfully requested with a view toward the issuance of an early Notice of Allowance.

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The examiner is cordially invited to telephone the undersigned attorney if this amendment raises any questions, so that any such question can be quickly resolved in order that the present application can proceed toward allowance.

Respectfully submitted,



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